

Phan (Migration) [2021] AATA 2866 (6 August 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Tan Dat Phan
VISA APPLICANT:	Mr Manh Cuong Tran
CASE NUMBER:	1833210
DIBP REFERENCE(S):	BCC2018/542887
MEMBER:	M. Edgoose
DATE:	6 August 2021
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 06 August 2021 at 3:02pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Spouse (Provisional)) – genuine and continuing relationship – limited joint finances, and household and social aspects of relationship while living in different countries – possible social stigma of same-sex relationship – nature of commitment – relationship developed while sponsor married – applicant works for business owned by visa agent – previous visitor visa applications to visit agent/friend, not sponsor – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5CB(2), 65

Migration Regulations 1994 (Cth), r 1.09A(3), Schedule 2, cls 309.211(2), 309.221

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 7 November 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 1 February 2018 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2).
4. The review applicant appeared before the Tribunal on 4 August 2021 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Manh Cuong Tran, the visa applicant. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The review applicant was represented in relation to the review by his representative.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

Whether the parties are in a spouse or de facto relationship

7. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the de facto partner of the review applicant who is an Australian citizen.

Are the parties in a de facto relationship?

8. 'De facto partner' is defined in s.5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
9. In forming an opinion as to whether the parties are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.09A(3) of the Regulations, which is attached to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
- 10.

11. Financial aspects of the relationship

12. At hearing, the review applicant informed the Tribunal that the financial aspects of the relationship are limited. The review applicant informed the Tribunal that they have no joint ownership of real estate or other major assets; no joint liabilities; no pooling of financial resources, especially in relation to major financial commitments; and neither party in the relationship owes any legal obligation in respect to the other.
13. The Tribunal has given regard to the concerns outlined by the review applicant's representative, dated 26 July 2021, that the parties are currently living in separate countries and as a result have limited evidence in relation to the financial aspects of the relationship. The review applicant's representative further asserted in his submission that the Tribunal should consider the joint payment of travel and accommodation between the review applicant and the visa applicant with significance in relation to the financial aspects of the relationship. The Tribunal is satisfied that the review applicant and visa applicant travelled together, however, there is no evidence to support the claim made in the representative's submission that joint payment was made in respect to the travel and accommodation. At hearing the visa applicant claimed that they took turns in paying for items when they travelled together. Given a lack of evidence to support this claim, the Tribunal gives the oral evidence from the visa applicant and the submission from the representative limited weight in relation to the financial aspect of the relationship.
14. The review applicant confirmed at hearing that he had made several money transfers to the visa applicant. The review applicant confirmed to the Tribunal that the visa applicant had never made any money transfer to him. Evidence of the money transfers from the review applicant to the visa applicant was submitted to the Tribunal. The evidence provided showed that AUD500 was transferred on 17/8/2020, AUD562 on 8/6/2021, AUD552 on 24/2/2021, AUD1141 on 25/12/2020, AUD563 on 26/1/2021, AUD558 on 27/4/2021, AUD575 on 29/6/2021 and AUD570 on 30/3/2021. The Tribunal also notes that the review applicant provided evidence of the purchase of a birthday cake in the amount of AUD60 with the note "happy birthday honey", and clothing to the value of AUD45.95. At hearing, the review applicant informed the Tribunal that the visa applicant requested he stop sending money transfers as he was financially independent. Since this request, the review applicant has not made any further money transfers. The Tribunal notes that the visa applicant never returned the money transferred to the review applicant. The visa applicant claimed at hearing that he is saving the money for the future with the review applicant. The Tribunal is not satisfied with the oral evidence provided at hearing in relation to the reasons for the money transfers and for these reasons the Tribunal gives limited weight on the evidence provided.
15. In consideration of the limited evidence, the Tribunal finds that the review applicant and visa applicant have not pooled their financial resources. The Tribunal finds for the period of time they travelled together they shared a limited level of day-to-day expenses given that lack of evidence to support this claim. The Tribunal finds no evidence that the couple have committed to joint ownership of real estate or other major assets, or that they have assumed any joint liabilities. The Tribunal finds no evidence that either party owes any legal obligation in respect of the other. Given the constraints of residing in separate countries the Tribunal places limited weight on consideration of the financial aspects of the relationship.

16. Nature of the household

17. The review applicant informed the Tribunal that he has a 20-year-old daughter from a previous relationship. The review applicant and visa applicant further stated to the Tribunal that they have no joint responsibility for the care and support of children. The Tribunal finds that there is no joint responsibility for the children's care and support.

18. The review applicant informed the Tribunal that his current living arrangement is a room in a shared house in Noble Park North. The review applicant further stated that he shares the house with the owner of the property and pays AUD550 per month rent for the room. The Tribunal notes that no evidence to support this claim was submitted to the Tribunal. The review applicant told the Tribunal that the visa applicant lives in Ho Chi Minh City in Vietnam by himself. The visa applicant confirmed this in his oral evidence and the living arrangements of the review applicant.
19. The review applicant provided the Tribunal with limited evidence of the nature of a shared household. The review applicant's representative made submissions to the Tribunal that the Tribunal should consider the shared accommodation as evidence of a shared household, insofar that the review applicant and the visa applicant shared accommodation with each other. At hearing the review applicant and visa applicant both claimed that when they have lived together, they have shared the responsibility for housework including cleaning and washing of clothes. Given the limited times and the length of the times the review applicant and visa applicant claimed to have shared accommodation, the Tribunal does not accept this as evidence of a shared household, given the lack of evidence, and temporary nature of the arrangements. On consideration of the limited evidence, the Tribunal gives limited weight in respect of the sharing of responsibility for housework.
20. Given the constraints of residing in separate countries, however, the Tribunal accords little weight to the consideration of the nature of the parties' household in this case.

21. Social aspects of the relationship

22. The review applicant informed the Tribunal that he introduces the visa applicant just normally to his family and friends, however, the visa applicant informed the Tribunal that he introduced the review applicant as "my husband", although they are not married. The review applicant told the Tribunal that his friends and acquaintances are very happy and supportive and send their best wishes about the nature of the relationship. The visa applicant stated that his friends and acquaintances have great sympathy for them but accept the relationship. The Tribunal found the review applicant provided limited responses to the Tribunal when questioned about the social aspects of the relationship, where the visa applicant answered more openly.
23. The review applicant and visa applicant informed the Tribunal that the last time they planned and undertook joint social activities was when the review applicant was in Vietnam in 2019. They both claimed that they visited friends, travelled together and ate out together. Although the review applicant and visa applicant might have spent time together when the review applicant last visited Vietnam, the Tribunal is not satisfied this attests to them being in a genuine and continuing de facto relationship.
24. The review applicant provided the Tribunal with several photographs of the review applicant with the visa applicant in public and social settings. The Tribunal acknowledges that these photos demonstrate that the review applicant and visa applicant have spent time together in a range of public and social settings, and that they have enjoyed spending some time together. However, the Tribunal is not satisfied that the photographs prove that they are in a genuine and continuing de facto relationship, and for these reasons the Tribunal gives limited weight to the photos submitted.
25. The review applicant provided the Tribunal with several translated sworn statements from the visa applicant's family and friends. The Tribunal places some weight on these.
26. However, the Tribunal notes that in the visa applicant's statement provided to the Tribunal, it was stated that, "Dat and I fell in love with one another in 2014 and started to have a

husband-and-wife life from April 2016". Notwithstanding this, in the visa applicant's mother's statement provided to the Tribunal, she declared that she did not know about her son's relationship until the beginning of 2018 and discovered the relationship inadvertently. Whilst the Tribunal is aware that social stigma may have contributed to the visa applicant not disclosing the existence of the relationship, the Tribunal is concerned that the visa applicant did not inform his mother of his same sex relationship for approximately two years.

27. The Tribunal further considered the supporting statutory declarations submitted to the Department in the visa application, one by the visa applicant's cousin, and another by the review applicant's friend. Such statements are the only evidence of the social aspects of the relationship that appear on the Department's file. Further, the Tribunal notes that whilst statements of support have been provided to the Tribunal, no statements from friends or family members of the review applicant were provided to the Tribunal. As such, the Tribunal is not satisfied that the parties represent themselves to others as being in a de facto relationship, and finds that the weight of evidence provided to the Tribunal is not commensurate with what the Tribunal expects to be of a genuine and continuing relationship.

28. Nature of persons' commitment to each other

29. As per the delegate's decision, the review applicant submitted to the Tribunal he first met the visa applicant at the airport in Vietnam in December 2013. The review applicant informed the Tribunal at hearing that he was at the airport to collect gifts from a mutual friend of both the applicants. After some further inquiries during the hearing, it was revealed to the Tribunal the mutual friend was Mr Jack Ta, the owner of Jack Ta and Associates, and the firm representing the applicants in this matter. After meeting for the first time in December 2013, according to the oral evidence of the applicants, the relationship did not develop until December 2014. The Tribunal notes that the review applicant separated from his wife in Australia in January 2015 and did not divorce his wife until 21 February 2016. As mentioned in the delegate's decision, the period of overlap of time in the development of the relationship while the review applicant was still married is of concern to the Tribunal.
30. The review applicant and visa applicant claim to have commenced their same sex de facto relationship in April 2016, just two months after the review applicant divorced his wife, when the review applicant travelled to Vietnam. During this visit they have travelled together to Thailand. Later that year, in November 2016, the visa applicant travelled to Australia for a business trip and stayed for a period of one month. The visa applicant claims that during his stay in Australia he stayed at the review applicant's home each night and during the day he was at work. The Tribunal asked the visa applicant what type of work he was doing during his time in Australia. It was revealed the he works for an immigration counselling service that organises and provides advice on obtaining a visa to Australia in Ho Chi Minh City. The Tribunal asked the visa applicant who the owner of this business was; he replied with a Vietnamese name. The Tribunal asked the visa applicant to provide an English translation of the owner of the immigration counselling service business and he informed the Tribunal that Mr Jack Ta is the owner of the business. The Tribunal makes no findings against the visa applicant working for Mr Jack Ta, however, the concern for the Tribunal in this matter is whether the parties are in a genuine de facto relationship.
31. As per the delegate's decision, the visa applicant lodged two visitor applications in 2017 which were refused following his trip to Australia in November 2016. The concern for the Tribunal is that in each of the visitor visa applications the visa applicant declared the purpose for travelling to Australia was to visit his friend, Mr Jack Ta, and made no mention of the review applicant. At hearing, the visa applicant told the Tribunal that he used his friends name, Mr Jack Ta, as he was to surprise the review applicant when he arrived in Australia. The Tribunal finds the visa applicant's oral evidence implausible, and therefore gives weight to the explanation provided.

32. The visa applicant informed the Tribunal that he has known Mr Jack Ta since 2009 and has worked for him since 2012. The visa applicant stated to the Tribunal that Mr Jack Ta is a friend and his boss, and he has also known the review applicant since he first arrived in Australia many years ago.
33. After the refusal of the visitor visa application, the visa applicant lodged a partner visa application in Ho Chi Minh City on 1 February 2018. The visa application was refused on 7 November 2018 and is the subject of this review.
34. The review applicant and visa applicant claim that they draw a degree of companionship and emotional support from each other as they regularly communicate through telephone calls, video calls and send each other messages, and that they care for each other. The review applicant, through his representative, submitted to the Tribunal the chat records between the review applicant and visa applicant via the social media applications Tango and Viber, as evidence of the parties' commitment to each other. The Tribunal accepts that the parties communicate, however, given that the transcripts of the Tango and Viber conversations were submitted in a language other than English and not translated, the Tribunal gives this evidence no weight.
35. The review applicant and visa applicant informed the Tribunal that they both see the relationship as a long-term one. The review applicant guaranteed to the Tribunal that he sees the relationship as a long-term one because they have been together since 2013. The visa applicant said to the Tribunal that they had been together for a long period of time and still love each other. Given the overall evidence available, the Tribunal is not satisfied that the parties see the relationship as a long-term one and the Tribunal finds that the relationship has been contrived for the purposes of the visa applicant gaining a migration outcome because the visa applicant has been refused visa applications in the past.
36. Based on the evidence, the Tribunal finds that the parties have not lived together in a genuine and continuing de facto relationship for a substantive period. The Tribunal accepts that the couple maintain a degree of communication while apart, but does not find that the parties draw a significant degree of companionship and emotional support from each other. On the evidence before it, the Tribunal finds that the persons do not see the relationship as being long-term or that the couple has a mutual commitment to a shared life together to the exclusion of others.
37. Having regard to all the circumstances of the relationship, the Tribunal is not satisfied that at the time of this decision, the review applicant and visa applicant have demonstrated a mutual commitment to a shared life to the exclusion of others. The Tribunal is not satisfied that their relationship is genuine and continuing. The Tribunal is not satisfied that the review applicant and visa applicant live together, or are not living separately and apart on a permanent basis. The Tribunal is not satisfied that the parties are in a genuine de facto relationship and finds that this visa application has been contrived for the visa applicant to gain a migration outcome.
38. On the basis of the above, the Tribunal is not satisfied that the requirements of s.5CB(2) are met at the time of this decision.
39. Therefore, the visa applicant does not meet cl.309.211(2) and cl.309.221.
40. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

DECISION

41. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

M. Edgoose
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;
- the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).